
(2013) 08 KL CK 0071

In the High Court Of Kerala

Case No : M.A.C.A. No. 488 of 2012

National Insurance Company Ltd.

APPELLANT

Vs

Gracy and Others

RESPONDENT

Date of Decision : 20-08-2013

Acts Referred:

Citation : (2013) 3 KHC 717 : (2013) 4 KLJ 101

Hon'ble Judges : M.L. Joseph Francis, J;K.T. Sankaran, J

Bench : Division Bench

Advocate : Lal George, for the Appellant; P. Sankarankutty Nair, T.K. Koshy, V.V. Risani, Babu T. Cheriyan and John Joseph Vettikad, for the Respondent

Judgement

M.L. Joseph Francis, J.—This appeal is filed by the second respondent Insurance Company in OP (MV) No. 595 of 2007 on the file of the Motor Accidents Claims Tribunal, Muvattupuzha. The above Original Petition was filed u/s 163A of the Motor Vehicles Act (for short, "the Act"). The case of the petitioners in the OP (MV) is briefly as follows: On 08/07/2006 at about 1.30 p.m., while deceased Baby Joseph was driving the car bearing Registration No. KL-05M/8364 from west to east along the Ernakulam-Muvattupuzha public road, the offending lorry bearing Registration No. KL-17D/709 came from the opposite direction and hit on the car, as a result of which the deceased sustained fatal injuries to which he succumbed on the way to the hospital. The accident has arisen out of the use of the vehicles bearing Registration Nos. KL-17/D-709 and KL-05/M 8364. The petitioners are the wife and children of deceased Baby Joseph. They are claiming compensation from respondents 1 and 2, who were the owner and the insurer of the offending lorry. Respondents 3 and 4 were the owner and insurer of the car driven by the deceased at the time of accident. The petitioners claimed Rs. 2,75,500/- as compensation.

2. The third respondent remained ex parte. The first respondent filed written statement contending as follows: The first respondent was the registered owner of the tipper lorry bearing Registration No. KL-17/D 709 involved in the accident

and the same was validly insured with the 2nd respondent for the relevant period. At the time of accident, Babu K. Varghese was driving the lorry and he was holding a valid and effective licence with No. L/EM/681/81 and therefore, even if it is found that the petitioners are entitled to get any compensation, the 2nd respondent alone is liable to pay the same. The second respondent filed written statement admitting that the offending lorry was insured with it in the name of the first respondent and contended that the accident occurred due to the rash and negligent driving of the car by the deceased. It was also contended that since the accident occurred due to the negligent act on the part of the deceased, the claim petition u/s 163A of the Act is not maintainable. The 4th respondent filed written statement admitting that the car bearing Registration No. KL-05/M 8364 driven by the deceased at the time of accident was insured with it in the name of the 3rd respondent for the relevant period and contended that the deceased was driving the car through wrong side. Since the accident occurred due to the rash and negligent driving of the deceased, the petitioners who are his legal heirs are not entitled to claim any compensation from the respondents, it was contended.

3. Before the Tribunal, no oral evidence was adduced from both sides. Exts. A1 to A6 and B1 to B4 were marked. The Claims Tribunal, on considering the evidence on record, found that the accident occurred solely due to the negligence of the deceased, who was driving the car through wrong side and that the petition being one filed u/s 163A of the Act will come under Chapter XI of the Act, which deals with insurance of motor vehicles against third party risks and that it is the settled position of law that the driver of the vehicle involved in an accident will not be a third party as far as the Insurance Company which insured the vehicle is concerned and found that the second respondent being the insurer of the offending lorry is liable to pay compensation u/s 163A of the Act and awarded a compensation of Rs. 2,49,500/- to the petitioners together with interest at the rate of 8% per annum from the date of petition till the date of realisation from the second respondent. Challenging the liability imposed on the second respondent as the insurer, the second respondent Insurance Company has come up in appeal.

4. Heard the learned counsel for the appellant and the learned counsel for the contesting respondents.

5. The learned counsel for the appellant submitted that as per Ext. B1 police charge and Ext. B3 mahazar, it was proved that the car was driven by the deceased through the extreme wrong side of the road and the police after investigation filed final report showing the deceased car driver as the accused, though the charge abated. Learned counsel for the appellant submitted that since the deceased was a tortfeasor, the petitioners are not entitled to yet any compensation from the appellant/Insurance Company.

6. The learned counsel for the appellant invited our attention to the decision reported in National Insurance Company Ltd. Vs. Sinitha and Others, in which it

was held that a claim u/s 163A of the Act is really a claim made under the "fault liability" principle and the question of negligence can be looked into for the purpose of determining the liability. Learned counsel for respondents 1 to 3 herein supported the award.

7. The Tribunal awarded compensation under various heads as follows:

8. In Ext. A5 post-mortem certificate, the age of the deceased was shown as 51 years at the time of accident. The Tribunal found that the deceased was within the age group of 50 to 55 years and the multiplier of "11" was taken as per the 2nd Schedule to Section 163A of the Act.

9. According to the petitioners, deceased was doing business and was earning a sum of Rs. 3,000/- per month. The Tribunal notionally fixed the monthly income of the deceased as Rs. 3,000/- as claimed in the petition. Out of that income, 1/3 was deducted towards personal expenses of the deceased and Rs. 2,000/- was taken as the monthly contribution to the family. The compensation for loss of dependency thus calculated will come to Rs. 2,64,000/- (2000 x 12 x 11). But, mistakenly, the Tribunal calculated the compensation under that head as Rs. 2,40,000/-. The Tribunal awarded Rs. 2,500/- towards loss of estate and Rs. 2,000/- towards funeral expenses, as claimed in the petition. Rs. 5,000/- was awarded towards compensation for loss of consortium as claimed in the petition. Thus, the Tribunal awarded a total compensation of Rs. 2,49,500/-.

Rectifying the arithmetical mistake in the calculation of compensation for loss of dependency, the total compensation to be awarded to the petitioners will come to Rs. 2,73,500/-.

10. In this appeal, the appellant is not disputing the quantum of compensation awarded, but challenges only its liability to pay the compensation awarded. The learned counsel for the appellant invited our attention to paragraphs 13 and 14 of the decision reported in National Insurance Company Ltd. Vs. Sinitha and Others, which reads as follows:

13. In the second limb of the present consideration, it is necessary to carry out a comparison between Sections 140 and 163A of the Act. For this, Section 163A of the Act is being extracted hereunder:

163A. Special provisions as to payment of compensation on structured formula basis.--(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case maybe.

Explanation.--For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

A perusal of Section 163A reveals that sub-section (2) thereof is in pari materia with sub-section (3) of Section 140. In other words, just as in Section 140 of the Act, so also u/s 163A of the Act, it is not essential for a claimant seeking compensation, to "plead or establish", that the accident out of which the claim arises suffers from "wrongful act" or "neglect" or "default" of the offending vehicle. But then, there is no equivalent of sub-section (4) of Section 140 in Section 163A of the Act. Whereas, under sub-section (4) of Section 140, there is a specific bar, whereby the concerned party (owner or insurance company) is precluded from defeating a claim raised u/s 140 of the Act, by "pleading and establishing", "wrongful act", "neglect" or "default", there is no such or similar prohibiting clause in Section 163A of the Act. The additional negative bar, precluding the defence from defeating a claim for reasons of a "fault" ("wrongful act", "neglect" or "default"), as has been expressly incorporated in Section 140 of the Act (through sub-section (4) thereof), having not been embodied in Section 163A of the Act, has to have a bearing on the interpretation of Section 163A of the Act. In our considered view the Legislature designedly included the negative clause through sub-section (4) in Section 140, yet consciously did not include the same in the scheme of Section 163A of the Act. The Legislature must have refrained from providing such a negative clause in Section 163A intentionally and purposefully. In fact, the presence of sub-section (4) in Section 140, and the absence of a similar provision in Section 163A, in our view, leaves no room for any doubt, that the only object of the Legislature in doing so was, that the Legislature desired to afford liberty to the defence to defeat a claim for compensation raised u/s 163A of the Act, by pleading and establishing "wrongful act", "neglect" or "default". Thus, in our view, it is open to a concerned party (owner or insurer) to defeat a claim raised u/s 163A of the Act, by pleading and establishing anyone of the three "faults", namely, "wrongful act", "neglect" or "default". But for the above reason, we find no plausible logic in the wisdom of the Legislature, for providing an additional negative bar precluding the defence from defeating a claim for compensation in Section 140 of the Act, and in avoiding to include a similar negative bar in Section 163A of the Act. The object for incorporating subsection (2) in Section 163A of the Act is, that the burden of pleading and establishing proof of "wrongful act", "neglect" or "default" would not rest on the shoulders of the claimant. The absence of a provision similar to sub-section (4) of Section 140 of the Act from Section 163A of the Act, is for shifting the onus of proof on the grounds of "wrongful act", "neglect" or "default" onto the shoulders of the defence (owner or the insurance company). A claim

which can be defeated on the basis of any of the aforesaid considerations, regulated under the "fault" liability principle. We have no hesitation therefore to conclude, that Section 163A of the Act is founded on the "fault" liability principle.

14. There is also another reason, which supports the aforesaid conclusion. Section 140 of the Act falls in Chapter X of the Motor Vehicles Act, 1988. Chapter X of the Motor Vehicles Act, 1988 is titled as "Liability Without Fault in Certain Cases". The title of the Chapter in which Section 140 falls, leaves no room for any doubt, that the provisions under the chapter have a reference to liability "... without fault...", i.e. are founded under the "no-fault" liability principle. It would, however, be pertinent to mention, that Section 163A of the Act, does not find place in Chapter X of the Act. Section 163A falls in Chapter XI which has the title "Insurance of Motor Vehicles Against Third Party Risks". The Motor Vehicles Act, 1988 came into force with effect from 01/07/1989 (i.e., the date on which it was published in the Gazette of India Extraordinary Part II) Section 140 of the Act was included in the original enactment under Chapter X. As against the aforesaid, Section 163A of the Act was inserted therein with effect from 14/11/1994 by way of an amendment. Had it been the intention of the Legislature to provide for another provision (besides Section 140 of the Act), under the "no-fault" liability principle, it would have rationally added the same under Chapter X of the Act. Only because it was not meant to fall within the ambit of the title of Chapter X of the Act "Liability Without Fault in Certain Cases", it was purposefully and designedly not included thereunder.

In that case, one Shijo was riding a motorcycle and that vehicle hit a stone lying on the road while giving way to a bus and Shijo succumbed to his injuries. The claim petition was filed u/s 166 of the Act, but later converted to one u/s 163A of the Act. The claimants contended that the compensation determined u/s 163A was determined under "no fault liability" principle. The Apex Court, explaining the decision in *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, held that Section 163A is founded on "fault liability" principle. It is open to the concerned party (owner or insurer) to defeat a claim raised u/s 163A of the Act by pleading and establishing any of the three faults, viz., "wrongful act", "neglect" or "default".

11. In the decision reported in *Oriental Insurance Co. Ltd. Vs. Joseph*, following the decision of the Apex Court in *National Insurance Company Ltd. Vs. Sinitha and Others*, this Court held that:

Reading of paragraphs 13 and 14 of the above judgment clearly indicates that the Apex Court, following its earlier judgment in *The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc.*, held that it is open for the owner of the vehicle or insurer to defeat the claim u/s 163A by pleading or establishing any one of the three faults as stated above. This would only mean that to avoid the liability of payment of compensation, the insurer and the insured can always take the defence by pleading any one of the faults as stated above i.e., "wrongful act", "neglect" or "default".

In that decision, in paragraph 8, it was held:

8. In the present case the appellant/insurer is pleading negligent act on the part of the rider of the motor vehicle, who is none other than the deceased himself. Therefore, in a case, where though a claim is raised u/s 163A, once the insurer or the insured comes up with the defence of absolving the liability to pay compensation, on the ground, that the deceased was responsible for the death injury on account of either wrongful act, negligent act or default, then, the liability of the insurer can be absolved, if such plea or defence is established. In the present case, the Tribunal has already concluded the cause for the accident as the negligence of the rider himself i.e., deceased Shine. There is no contra material brought on record indicating that he was not responsible for the accident. Though, a feeble attempt came to be made on the part of the claimants/respondents counsel suggesting that another vehicle was involved in the accident which was responsible for the accident, unfortunately neither the owner nor the insurer of that vehicle are before us. If the insured and the insurer of other vehicle were to be party to the proceedings, then automatically the deceased and his legal representatives, who are the claimants could be termed as third parties so far as the other vehicle is concerned.

12. A Division Bench of this Court, in the decision reported in National Insurance Company Ltd. v. Sajitha Beegom N. and Others 2012(3) KHC 527 (DB) : 2012 ICO 1181, relying on the decision reported in National Insurance Company Ltd. Vs. Sinitha and Others, found that the claim u/s 163A of the Act can be defeated on the basis of consideration regulated by "fault liability" principle.

13. In Ningamma and Another Vs. United India Insurance Co. Ltd., "the maintainability of a claim petition filed by the dependants of the deceased u/s 163A of the Act was considered by the Apex Court. In that case, the deceased was riding a motorcycle, which dashed against a bullock cart proceeding ahead, resulting in the death of the motorcyclist. It was in evidence that the deceased had borrowed the motorcycle from its owner. Allowing the claim petition filed by the legal representatives u/s 163A of the Act, the Tribunal awarded compensation and directed the Insurance Company to pay the amount. When the matter was taken in appeal before the High Court, the High Court held that the claim petition was not maintainable as there was no tortfeasor involved. The said decision was upheld by the Apex Court holding that as the deceased who was the borrower, stepped into the shoes of the owner, he cannot himself be a recipient of compensation as liability to pay the same is on him. The legal representatives of the deceased would not be entitled to claim compensation, especially because, no other vehicle was involved, it was held." In the decision reported in Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, a three Judges Bench of the Apex Court held:

Section 163A was introduced in the Act by way of a social security scheme, it is a code by itself. Section 140 of the Act dealt with interim compensation but by inserting Section 163A Parliament intended to provide for the making of an

award consisting of a predetermined sum without insisting on a long-drawn-out trial or without proof of negligence in causing the accident. Section 163A of the Act covers cases where even negligence is on the part of the victim. The amendment, was, thus, a deviation from the common law liability under the law of torts and was also in derogation of the provisions of the Fatal Accidents Act. The Act and the Rules framed by the State in no uncertain terms suggest that a new device was sought to be evolved so as to grant a quick and efficacious relief to the victims falling within the specified category. The heirs of the deceased of the victim in terms of the said provisions were assured of a speedy and effective remedy which was not available to the claimants u/s 166 of the Act. It is by way of an exception to Section 166 and the concept of social justice has been duly taken care of.

In the present case, two vehicles are involved in the accident. The deceased was a third party as regards the other vehicle is concerned. In view of the principles laid down in the above mentioned three Judges Bench decision of the Apex Court, we are of the view that the claims Tribunal is justified in awarding compensation u/s 163A of the Act to the petitioners in the Original Petition even though negligence was on the part of the deceased.

Accordingly, this appeal is dismissed as it is without any merits. We make it clear that the petitioners in the Original Petition (MV) are entitled to get Rs. 2,73,500/- as compensation together with interest at the rate awarded by the Tribunal and proportionate costs, as there is an arithmetical mistake in the calculation of compensation in the award passed by the Tribunal. There is no order as to costs.